Supreme Court, U.S.
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No. 99-478

In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of New Jersey

BRIEF OF AMICI CURIAE BRUDNICK CENTER ON VIOLENCE AND CONFLICT, CALIFORNIA ASSOCIATION OF HUMAN RELATIONS ORGANIZATIONS, CENTER FOR DEMOCRATIC RENEWAL, CENTER ON HATE & EXTREMISM, HATEWATCH, NATIONAL ASSOCIATION OF HUMAN RIGHTS WORKERS, AND NORTHWEST COALITION FOR HUMAN DIGNITY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does New Jersey's bias-motivated crime sentencing enhancement provision codified at N.J. Stat. Ann. § 2C:44-3(e), which gives a judge authority to impose an additional term of incarceration on the sentence of a convicted criminal, upon a showing of a bias motive by a preponderance of the evidence, violate the Constitution?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The *amici* academic and civil rights organizations described below, representing all regions of the nation, support the enactment and subsequent enforcement of sentence enhancement provisions against those convicted of bias-motivated crimes. *Amici* has received consent from both the petitioner and respondent to file this brief with the Court.

The *Brudnick Center on Violence and Conflict* at Northeastern University in Boston is a national education and public policy organization devoted to the analysis of the causes and possible solutions relating to violence and conflict in American society.

The San Francisco based *California Association of Human Relations Organizations* is a statewide human rights and educational organization devoted to the implementation of creative solutions to the problems of discrimination and hate violence.

The Atlanta, Georgia based *Center for Democratic Renewal* (CDR) is a national nonprofit clearinghouse for information on constructive non-violent responses to hate group activity and bigoted violence. Founded in 1979 as the National Anti-Klan Network, today, the CDR conducts programs, research, leadership training, community organizing, public education and litigation. Its

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

thousands of members and supporters are located throughout the United States.

The California based *Center on Hate & Extremism* is a non-partisan national public policy and educational organization devoted to the study of the characteristics and proposed solutions relating to bias-motivated violence.

Hatewatch is a nonprofit Internet based civil rights organization based in Cambridge, Massachusetts. *Hatewatch* serves as a resource for information on extremists, hate crime, and the legal responses to these problems.

The *National Association of Human Rights Workers* ("NAHRW"), organized in 1947, is composed of individuals throughout the United States who are engaged in human and civil rights work as professionals. The NAHRW encourages the collection and sharing of ideas and information on ways to improve inter-group relations and reduce bias-motivated violence.

The *Northwest Coalition for Human Dignity* is a regional civil rights organization based in Seattle, Washington devoted to fighting prejudice and intolerance through creative community based means and appropriate legislative measures.

SUMMARY OF ARGUMENT

New Jersey's bias-motivated crime sentencing enhancement provision, codified at N.J. Stat. Ann. § 2C:44-3(e) is a constitutional exercise of the legislature's authority to define crimes and the mechanism by which they are punished. *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993). States have traditionally relied on a convicted criminal's motive as a sentencing factor. Motive in its usual form is distinct from intent and not an essential element of an offense. *Pointer v. United States*, 151 U.S. 396, 415 (1894).

In this particular instance the New Jersey legislature has taken an especially egregious type of motivation, bias motivation, and codified it as a specific factor at sentencing. The legislature did not create a new category of offense, nor impermissibly reclassify an existing material criminal element merely as a sentencing factor to avoid constitutional requirements. Rather, the legislature created an overlay motive-based sentence enhancer applicable to a broad range of complete and wholly intact statutes.

Defendants are not constitutionally entitled to a jury trial on every fact that may impact on their sentence. *McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986); *Patterson v. New York*, 432 U.S. 197, 214 (1977). While extra punishment is afforded by this enhancer, the added penalty is not of a degree that distinguishes it from that of other allowable sentence enhancers. The structure of the bias-motivated enhancement statute as a broadly applicable

overlay provision, coupled with its clear wording, prescribed burden of proof, and its reliance on motive establish that the statute should be applied precisely as New Jersey's legislature intended it: as a sentencing factor rather than as an essential element of any particular offense. See generally, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Because bias motivation is a form of a permissible and traditional sentencing factor, it may be established by a judge upon a showing of preponderance of the evidence.

ARGUMENT

BECAUSE MOTIVE IS DISTINGUISHABLE FROM INTENT IT HAS TRADITIONALLY BEEN APPLIED AS A SENTENCING FACTOR RATHER THAN AS AN ELEMENT

The sentencing enhancement provision for bias-motivated conduct at issue in this case, N.J. Stat. Ann § 2C:44-3(e), "Criteria for sentence of extended term," properly invokes motive as a primary sentencing factor, rather than as an element of the substantive underlying offense. The enhancer provides for an extended term when an underlying crime is found by the court to have been committed "with a purpose to intimidate . . . because of race, color, religion, sexual orientation or ethnicity" by a preponderance of the evidence. Petitioner, after an adjudication of guilty for an underlying crime, received an additional two year term of incarceration out of a possible ten year term because he demonstrated a

racially biased motive when he fired a gun into the home of a sleeping African-American family.

Motive, like other sentencing factors, is typically most applicable after a defendant has been convicted of an underlying crime. As this Court stated in *Wisconsin v. Mitchell*, 508 U.S. at 485 (1993) : "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." The Court in *Mitchell* continued (*quoting* 1 Wayne LeFave & Austin Scott, *Substantive Criminal Law* § 3.6(b), p. 324 (1986)): "Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives." Over a century ago this Court recognized that: "The presence or absence of a motive for the commission of the offense charged is always a legitimate subject of inquiry, . . . but it is not in any case indispensable to a conviction. It is not an element of the burden of proof the law devolves upon the prosecution whether the agency or connection of the accused is manifested by direct and positive evidence or only by circumstantial evidence that a motive or inducement to commit." *Pointer v. United States*, 151 U.S. 396, 414 (1894) (*quoting Clifton v. State*, 73 Ala. 473, 478-479 (1883)).

Generally speaking motive differs from intent in several important ways. In its simplest definition criminal intent refers to the *mens reas* or the level of awareness or purposefulness one has in relation to the criminal act or

actus reus.[2] Traditionally, a punishable crime results when this culpable intent combines with a criminal act or omission to produce an illegal result for which the offender has no exculpatory defense. While intent answers the required "what" query in relation to a criminal mindset, motive answers "why"?

Motive need not be an element of an offense to have a bearing on punishment. In some instances, however, motive is a material *mens rea* element of an offense that must be proved at trial beyond a reasonable doubt before a jury. Burglary, for example, punishes those who enter a building under certain circumstances "with purpose to commit a crime therein." Model Penal Code § 221.1 With certain offenses motive is transformed from a post conviction sentencing factor used to assess the length of punishment into a form of intent used to establish guilt. As Boston University Law School Professor Frederick Lawrence explains: "The formal distinction, therefore, turns entirely on what are considered to be the elements of the crime. What is a matter of intent in one context may be the matter of motive in another." Frederick M. Lawrence, *Punishing Hate: Bias Crime Under American Law,* 108 (1999).

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[2] Criminal motive is "[S]omething in the mind or that condition of mind which incites to action or induces action, or gives birth to a purpose. Distinguishable from intent which represents the immediate object in view while motive is the ulterior intent." Henry Campbell Black, *Black's Law Dictionary,* 197 (5th ed. 1983). Another commentator explained, "Specifically, intent concerns the mental state provided in the definition of an offense for assessing the actor's culpability with respect to the elements of an offense. Motive, by contrast, concerns the cause that drives the actor to commit the offense." Frederick M. Lawrence, *Punishing Hate: Bias Crime Under American Law,* 108 (1999)

BECAUSE A BIAS MOTIVE IS A FORM OF MOTIVE, IT TOO MAY BE PUNISHED AS A SENTENCING FACTOR RATHER THAN AS AN ELEMENT OF AN OFFENSE

A specific bias motive penalty enhancer statute is not necessary for such motivation to play a role in punishment at sentencing. The Florida District Court of Appeal upheld the use of a defendant's bias motive as a proper basis for an upward departure in a criminal sentence where the state's bias-motivated penalty enhancer law did not apply to the underlying substantive statute. *Grant v. State,* 586 So. 2d 438 (Fla. App. 1991); *Wray v. State,* 639 So. 2d 621 (Fla. App. 1994). Federal courts have also allowed an upward departure in a criminal's sentence because of his racially biased motive for committing a non-civil rights offense at a time when the Federal Sentencing Guidelines did "not explicitly address racist motivation for criminal conduct." *United States v. McAninch,* 994 F.2d 1380, 1387-89 (9th Cir. 1993), *cert. denied,* 510 U.S. 949 (1993). This Court has previously established that a judicial finding of racial motivation was sufficient to overturn a jury recommendation of life imprisonment in favor of a death sentence in a capital murder case. *Barclay v. Florida,* 463 U.S. 939, 949-950 (1983). In *Barclay,* this Court found that a defendant's desire to start a race war was relevant to a variety of other statutory factors. *Id.* Thus, evidence of a racial bias motivation relevant to the commission of a crime may be introduced before a sentencing proceeding: "The Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing merely because those beliefs and associations are protected by

the First Amendment." *Dawson v. Delaware*, 503 U.S. 159, 165 (1992).

As with motivation in general, a legislature can make bias motivation a material intent factor which must be proven beyond a reasonable doubt, or in the alternative merely a statutory required factor at sentencing, with a burden of proof of its choosing.

> The justice system adjusts culpability for conduct according to the level of intentionality, such as purposefulness, recklessness, or negligence. However, as the *Mitchell* decision found, even within the same level of intentionality, the law frequently makes distinctions based on the reason why a crime was committed. Motive is often more than a tangential consideration, or even a factor at sentencing – it is frequently made a material element of a particular offense.

Brian Levin, *Hate Crimes: Worse by Definition*, 15 J. CONTEMPORARY CRIM. JUST. 6, 12 (1999). Professor Lawrence explains: "Consider the bias crime of a racially motivated assault upon an African-American. There are two equally accurate descriptions of this crime, that is, two different ways in which a state might define the elements of this bias crime: one describes the bias as a matter of *intent*; the other, as a separate matter of *motive*." *Punishing Hate: Bias Crime Under American Law: supra* at 108. California has enacted a stand alone intent-oriented statute that makes it a crime to interfere with one's civil rights "because of race" and other status characteristics. California Penal Code § 422.6. In Wisconsin the legislature decided that the intentional and discriminatory selection of a victim

should be a sentence enhancer. Unlike some other sentence enhancers which only require proof by a showing of preponderance of the evidence, the Wisconsin legislature set the burden of proof at beyond a reasonable doubt. Wis. Stat. § 939.645 (1989-90) Previously, this Court ruled unanimously that Wisconsin could constitutionally enact and enforce a sentence enhancement statute that punished the same criminal conduct more severely when committed on the basis of race and other protected group categories. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

Not all states, however, have opted to punish bias-motivated crime in the same way:

> Because the bias motivation is not an element of the underlying offense, the government in seeking to establish an aggravating factor or to obtain an enhanced penalty may not bear the same burden of proof that it would in establishing an essential element. New Jersey's and North Carolina's statutes specifically provide that the grounds supporting an extended term be found by the court by a "preponderance of the evidence." Alaska requires that factors in aggravation be established by "clear and convincing evidence."

Lu-In Wang, *Hate Crimes Law* (1995), § 10.03[2d].[3] Variations in how states punish a particular crime are simply not a basis for concluding that one state's approach is constitutionally suspect:

> [T]he fact that the States have formulated different statutory schemes to punish armed felons is

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[3] N.C. Gen. Stat. § 15A-1340.16(d)17; Alaska Stat. Ann. § 12.55.155(f).

> merely a reflection of our federal system, which demands "tolerance for a spectrum of state procedures dealing with a common problem of law enforcement," *Spenser v. Texas*, 385 U.S. 554, 566 (1967) [citations omitted] That Pennsylvania's particular approach has been adopted in few other states does not render Pennsylvania's approach unconstitutional.

McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986).

New Jersey's enactment and enforcement of its bias-motivated crime statute are valid because generally states have the constitutional authority to determine how they punish and define crimes. New Jersey's legislature properly followed its mandate: "for the primary responsibility for fixing punishment lies with the legislature." *Wisconsin v. Mitchell*, 508 U.S. at 486. As this Court stated in *Patterson v. New York*, 432 U.S. 197, 201-202 (1977):

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

THE OPERATION OF NEW JERSEY'S BIAS MOTIVATION ENHANCER LAW DOES NOT CONTRAVENE EXISTING REQUIREMENTS RELATING TO SENTENCING FACTORS

New Jersey's bias-motivated sentence enhancer does not contravene established principles relating to the constitutionality of sentencing factors. The legislature did not diminish, constrict or evade the state's burden of proving guilt beyond a reasonable doubt for all of the material elements of an underlying crime. *McMillan v. Pennsylvania*, 47 U.S. at 87-88. While the *McMillan* case dealt with a mandatory minimum provision as opposed to an increased maximum as is the case here, this Court has subsequently made it clear that such a difference in and of itself is not constitutionally significant. *Almendarez-Torres v. United States*, 523 U.S. at 243. In addition the magnitude of the increase in the maximum authorized sentence in New Jersey's statute is well within a range that the Court has found permissible. *Almendarez-Torres v. United States*, 523 U.S. at 236. The effect of New Jersey's bias crime enhancer is not analogous to the impermissible penalty disparity separating a small fine from life imprisonment. *Mulaney v. Wilbur*, 421 U.S. 684, 700 (1975). The Court summarily rejected the rule "that any significant increase in a statutory mandatory sentence would trigger a constitutional 'elements' requirement" when analyzing sentencing factors. *Almendarez-Torres v. United States*, 523 U.S. at 246. Indeed, this Court held in *Barclay* "that it was permissible to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe 'enhancement' of all." *Wisconsin v. Mitchell*, 508 U.S. at

486. The Court's finding in *Almendarez-Torres* that recidivism is not a crime element because it is a traditional sentencing factor, is equally applicable to motive – also a traditional sentencing factor.

Jones v. United States, 526 U.S. 227 (1999) is not dispositive to the facts in this case. The structure of 18 U.S.C. § 2119, is such that the statute did not logically or grammatically present a complete offense in the absence of a reading of the entire text, which included the grading of penalties. Furthermore, injury severity is traditionally an element of an offense, while motive is not.

CONCLUSION

The New Jersey Supreme Court correctly held that the state's bias-motivated crime enhancement law is a constitutional exercise of legislative authority to properly designate an aggravating factor at sentencing. The state did not enact a new offense, nor did it relieve itself of the obligation to establish guilt beyond a reasonable doubt before a jury for existing underlying offenses. Motive is a traditional post trial sentencing factor that can be indispensable to the formulation of a just sentence after guilt has been determined. In summation – motive matters. As one commentator noted: "The effect of Kristallnacht on German Jews was greater than the sum of the damage to buildings and assaults on individual victims." James Weinstein, *First Amendment Challenges to Hate Crime Legislation*, 11 CRIM. JUST. ETHICS 10 (1992). Therefore, it is entirely permissible for a legislature to codify a particularly reprehensible motive, such as racial bias, into a

judicial sentencing factor rather than an offense element, if it so chooses without contravening the Fifth, Sixth or Fourteenth Amendments' protections relating to due process and jury trials. The decision of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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